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Supreme Court of the United States

OCTOBER TERM, 1957

No. 111 MISC.

LIONEL A. DOMINGUEZ,
Petitioner,

versus

THE UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No.

LIONEL A. DOMINGUEZ,

Petitioner,

versus

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lionel A. Dominguez, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cause on May 24, 1957, affirming the judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division of October 6, 1956.

Opinions Below

The trial court filed no opinion. The opinion of the court of appeals (R. 225) is not reported as of date of this application. Application for rehearing denied June 25, 1957 (R. 230).

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered on May 25, 1957 (R. 225). Petitioner filed a petition for rehearing which was denied on May 25, 1957 (R. 230) the jurisdiction of this Court is invoked under Title 28, U.S.C. Sec. 1254(1). See also Rule 37(b) of the Federal Rules of Criminal Procedure, promulgated by the Court February 8, 1946.

Questions Presented

1. Whether the District Court erred in denying defendant's motion for acquittal after the Government had rested and after the defense had rested in the trial of said matter.

2. Whether the Court erred in finding on the record that the defendant had a specific intent to violate the Internal Revenue Laws by willfully failing to file an income tax return.

Statute Involved

Title 26 Sec. 145(a) U. S. Code.

STATEMENT

On March 24, 1956, appellant, was charged in a bill of information in two counts with the violation of Title 26, United States Code, Section 145(a) in that he was required by law to file income tax returns for the calendar years 1952 and 1953 and that he did wilfully and knowingly fail to make said tax returns to the Director of Internal Revenue.

On March 24, 1956, the appellant entered a plea of "Not Guilty" to said bill of information and the case was duly set for trial on October 29, 1956.

On October 30, 1956 the appellant was found guilty on both counts of said bill of information.

And on November 9, 1956 the appellant was sentenced to imprisonment as follows:

One (1) year on Count 1 and $10,000 fine

One (1) year on Count 2 and $10,000 fine

Prison sentence imposed on Count 2 to run consecutive to the sentence imposed on Count 1.

Sentence to begin upon expiration of sentence in State Court and defendant to pay all costs of prosecution and to stand committed for non payment of fine.

The defendant is charged with violations of § 145(a) Title 26 USCA which reads as follows:

> "Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who wilfully fails to pay such an estimated tax or tax,

make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

The charges in substance are that he did wilfully and knowingly fail to file income tax returns for the calendar years 1952 and 1953.

The defendant is a family man who was at the time of the trial 62 years of age (T-58) and of a very limited education. (T-92)

That during the taxable years 1952 and 1953 that his principal source of income was derived from the operation of a lottery business in New Orleans, Louisiana. (T-34)

That because of his limited education it was necessary for the defendant to hire two bookkeepers to take care of the books of the lottery business (T-15, 29) and an accountant to prepare his Withholding Tax, Social Security, and Income Tax returns. (T-112)

At a date prior to 1952 the defendant was in arrears with his payments for the 10% Wagering Taxes and that after a conference with agents of the Government his tax liability including penalties and interest was determined. (T-65, 85). During this period and subsequent to the conference the defendant paid some $38,000 on this delinquent balance.

During the year 1952, he made numerous payments which included interest. (T-58)

That each year his employees would turn over to the accountant his books and records so that the accountant could prepare the income tax and other returns. (T-23) That these records were turned over timely so that the returns could be prepared.

That during March, 1953, Agents of the Intelligence unit began an investigation into the affairs of the defendant to determine his tax liability. That during this period and continuing thereafter until August, 1954 (T-37) that they examined his books and records. That these personal books and records were freely given to the agents (T-48). And that all information was readily made available to the Agents. They were at his home on numerous occasions and that the defendant fully cooperated with them. (T-20, 49)

That the original books and entries were at the time of the investigation located at the home of his accountant. (T-36) That in the words of the government agents, the defendant's employees kept an elaborate and accurate set of books (T-34, 49) and that from them could be prepared an income tax return unless something was not contained in the books. (T-51)

During the course of the trial, numerous documents were introduced into the record showing substantial payments of sums of money to the government, but the receipts did not reflect the amount of interest paid (T-60, 79, 91) to the Government although repeated attempts had been made by

his employees to obtain this information from the government.

It was established during the trial of the case that his accountant had for the calendar year 1952 prepared his income tax return, but had not completed it (T-52), as he was unable to secure the amount of interest that had been paid to the Government, although the interest paid the government would be deductible. (T-78) That during this year, at least one extension of time had been granted, but that no return was filed. (T-122)

That during the course of the Agents investigation, they discussed his income tax returns with the defendant and he referred them to his bookkeepers and accountants. (T-60) It was established that it would have been impossible for an uneducated man to prepare the return or to compute the interest in order to prepare the return, but that an accountant could. (T-51, 92)

During the year 1954 the defendant was under investigation by the State of Louisiana and during that year his books and records were seized and impounded by the State for the use by the Grand Jury. (T-125)

The accountant employed by Dominguez testified that he was charged with the duty of preparing the personal returns of the defendant. (T-112)

That he had the books of original entry (T-23) and had prepared the return for the year 1952 (T-105) but that he did not file it as he had a deductible item of interest on a sum of money that had been paid to the government

during the year 1952. That although he made repeated attempts to secure the amount of interest paid that it was without avail. (T-116)

That at no time did he advise the defendant that he failed to file a return and merely said he was so busy he could not prepare the return. (T-123)

That he was never told that he should not file a return. (T-121)

That he had correspondence with the Government and that he advised them that the return had not been filed because he could not get the necessary information to prepare the return. (T-118, 120)

Throughout the entire trial, no one was ever able to tell the amount of money that was applicable to interest payments of all of the sums paid by the defendant. (T-135)

The rights of the defendant Dominguez were protected on motions of Acquittal after the government rested (T-177) and after the defense rested. (T-177) After conviction an appeal was duly taken. (T-221)

SPECIFICATION OF ERROR TO BE URGED

(1) The defendant's motion for acquittal after the government rested and after the defense rested should have been granted.

(2) That no intent was proven in this case, to establish that the defendant did knowingly and wilfully fail to

file Income Tax Returns for 1952 and 1953 within the meaning of Title 26 §145(a).

REASONS FOR GRANTING THE WRIT

I.

The rights of the defendant were protected on motions for acquittal after the government rested (T-177) and after the defense rested.

It is submitted that there was no evidence introduced by the government that would substantiate its position that the defendant did knowingly and wilfully fail to file the required income tax returns. That there was no doubt but that he knew of his obligation to keep the required records and to file the said income tax returns and that he had done all within his power to comply with his obligations but that relying on his accountants advice he did not do that which he should have done. The testimony of the Agents who were at his home and had his records for a period in excess of 1½ years clearly showed that he tried to fully comply with his obligations. That he tried to the best of his limited ability to keep good books and comply with every obligation that was required of him. That notwithstanding this, through the carelessness or neglect of his accountant, the one who had the obligation and who was paid for preparing said return, this was not done. Can it be said that a practically illiterate man, who had done all within his power to comply with the provisions of law and through the fault of others, wilfully fail to perform an obligation required of him.

It is respectfully submitted that the motions herein outlined should have been granted and that the refusal of the Court to grant the motions constituted prejudicial error.

II.

That no intent was proven in this case to establish that the defendant did knowingly and wilfully fail to file Income Tax Returns for 1952 and 1953 within the meaning of Title 26 §145(a).

It is submitted that the evidence in this case shows that beyond any doubt that the defendant had no intent to violate Title 26 §145(a).

This statement is being made in view of all of the testimony adduced at the trial and primarily from the testimony of the governments own witnesses.

Their testimony clearly showed that for a period of time prior to the date on which the Income Tax return was due that your appellant had had conferences with the Department concerning his liability for Wagering Taxes as his principal source of income was from the operation of lotteries. That as a result of these conferences that a certain tax liability had been established and that by agreement he had certain payments to make periodically which payments included interest and penalties.

That because of the very nature of his business he knew that he had to keep an accurate set of books and to file returns.

Being an illiterate man, he surrounded himself with the best clerical help that was available and kept in the words of the governments agents a most elaborate and accurate set of primary records.

His next responsibility was to hire an accountant to prepare the tax returns required of his business. In this regard he chose an individual who he believed would meet the necessary requirements.

That at about the time that the return for the year 1952 was due, he had his clerk deliver to his accountant his books for the purpose of preparing his Income Tax Return for the Calendar year 1952.

At about the time the return was due to be filed, agents of the Intelligence Unit contacted him and stated their desire to check various and sundry returns including his income taxes.

Knowing by the very means that he earned a livelihood and having had prior dealings with the government, he immediately instructed his employees, including his accountant to make his records available. These agents were according to their own testimony checking his records for a period of one year and one half and it was during this period that he was required to file the said returns.

Can it be said that a person, unless he be insane, would fail to file an income tax return not for one year, but for a second, while the agents are in his home and checking his records.

From the testimony, there can be no doubt that the defendant relying on the advice of his accountant, though no doubt it was bad, believed that he was not required to file the said return until his accountant acquired necessary information from the Government concerning interest paid to the Government in order to prepare the return.

As an evidence of his good faith, immediately upon receiving from the Government a communication that he failed to file an income tax return for the calendar years 1952 and 1953, he contacted and delivered to his accountant the letter so that a reply could be made.

The letter, Exhibit D-37, (T-117) and particularly the reply made to said letter by his accountant which is set out in extenso in this brief and was duly filed in said case as Exhibit D-39. The said letter reads as follows:

> "Dear Sir: Yours of the 14th, to hand. In reply wish to say that we were not only badly surprised but at a loss to understand the attitude of the Department.
>
> "In the first place there was no wilfull failure to file the returns mentioned, but the failure stemmed from the fact that we have been trying to get some figures from the department so as to enable us to complete said returns, but up to this writing we have failed to receive the required data.
>
> "The information we have requested is the amount of interest paid on delayed payment of taxes; as payments have been made in various sums

and periods we only have received the acknowledgement of total amounts paid, which did not show the breakdown between principal and interest.

"As the amounts paid in interest is considerable and would reduce our tax liability a very good sum, we think that we are entitled to this courtesy.

"In the matter of a conference, we would ask if it would be possible to have said meeting in New Orleans, as it would be physically impossible for me to go to Dallas, Texas at the present time.

"For your information I wish to say that the 1952 Return is all but completed, except for the Interest paid and with the figures as they now stand the tax due would be $15,580.75, so that I fail to understand where your staff got the figure you quote in the letter, and I am sure that after deducting the interest paid, my tax should be under the amount I have mentioned.

"Thanking you for an early reply, I am, Yours truly, Andrew Dominguez."

That about this period, all of his records according to the accountant were seized by the State authorities. His accountant stated under oath that he did not advise his client nor did he take any necessary steps to protect his clients interests. That by his own admission that after making requests for the amount of interest payments made to the Government so that he could prepare the return for 1952 and

not receiving it he let the matter go. But that he did not tell the defendant.

Here is a singular example where a man relying on the services of others finds himself in difficulty with his Government.

And in this case, the government is itself not without fault. If it is taken as true and it has not been denied numerous requests were made of the government to advise the amount of interest paid during the year 1952. That the accountant and others made requests for the required information covering the interest paid were either ignored or they were unable to supply it. They were always referred to someone else who could not give it. Even to this date, no one has told the amount of interest that has been paid.

Certainly it could not be argued that the reason that no returns were filed was that he didn't have money to pay the taxes due. The government knew that he had filed other returns and had not paid the taxes and that he was liquidating his tax liability to the best of his ability. Nor was any attempt to conceal the amount of his income. His returns for the year 1952 were prepared and which showed the amount of his gross income which incidentally was within a few hundred dollars of the figures compiled by the agents although the gross income was approximately one half million dollars.

There can be no doubt from a reading of the record that the defendant relying on the advice and employment of an accountant has been placed in a position of jeopardy

that had never been intended by the framers of our Constitution when they placed Section 145(a) in Title 26 of the I.R.C.

It is significant to note by way of observation that the agents and the defendants employees all dealt with each other, but that on all matters pertaining to the books of account and that the defendant left that to them exclusively. Could it be but that the defendant did not know the finer wordings and left that up to his employees and that the agents of the government were cognizant of that fact?

No case can be more illustrative, or in reason more conclusive, than the case before the bar of any lack of intent on the part of the defendant to wilfully violate the law. It has for all intent and purposes been admitted that no income tax returns were filed and that while a "forbidden act" was done there was no criminal intent or wilful purpose on the defendant's part to do it.

The word "Wilfully" as used in this statute has been defined by the Supreme Court to mean:

> "An act done with a bad purpose . . . without justifiable excuse . . . stubbornly, obstinately, perversely . . . to characterize a thing done without ground for believing it is lawful . . . or conduct marked by the careless disregard whether one has the right so to act."

U. S. vs. Murdock, 290 U. S. 389.

The Court in the same case said further:

> "He whose conduct is defined as criminal is one who "wilfully" fails to pay a tax, to make a return or to supply needed information. Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be wilfull, to be criminal, is persuasive that the same element is essential to the offense of supplying information."

In an early Texas case of *Reagan vs. State*, 28 Texas Court of Appeals, 227 Opinion by renouned Judge Hurt, where intent was a necessary ingredient, it was held that:

> "The particular intent charged must be proved to the satisfaction of the jury (beyond a reasonable doubt). No intent in law, nor mere legal presumption, differing from the intent in fact will be allowed to supply the place of the latter."

> "Proof of 'wilfulness' is . . . the crucial core of a tax evasion case." Balter, Fraud Under Tax Law, Sec. 158.

Again in the case of *U. S. vs. Spies*, 317 U. S. 492, the Supreme Court stated:

"Congress did not define or limit the methods by which a wilful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition construct the scope of the congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative wilful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kinds, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

Also see *Jones vs. United States*, (CA 5, 1947), 164 F. 2d 398; *Montgomery vs. United States*, (CA 5, 1953) 203 F. 2d 887; *Hartman vs. United States*, (CA 8, 1954) 215 F. 2d 386; *Berkovitz vs. United States*, (CA 5, 1954) 213 F. 2d 468; *Lurding vs. United States*, (CA 6, 1950) 179 F. 2d 419.

This Honorable Court in the case of *Hargrove vs. The United States*, (67 Fed. 2, 820) said:

"* * * when the statute simply denounces the doing of an act as criminal, and when it denounces as criminal only its wilful doing. In the first class

of cases, especially in those offenses mala prohibita, the law imputes the intent. Lander vs. U. S. (CCA) 296 Fed. 75; U. S. vs. Balint, 258 U. S. 250. Had the prosecution here been under such a statute the charge of the Court would have been unexceptionable. In the second class of cases, a specific wrongful intent, that is, actual knowledge of the existence of obligation and the wrongful intent to evade it is of the essence."

Again in the case of *Wardlaw vs. U. S.*, (CA 5, 1953) 203 Fed. (2) 884 this Honorable Court said:

"* * * The intent involved in this offense is not rendered in the act itself but is a specific intent involving bad purpose and evil motive and that specific intent must be proved by or clearly inferred from the evidence. * * *"

Further this Court said:

It is now settled that "Wilfully" as used in this offense means more than intentionally or voluntarily, and included an evil motive or bad purpose, so that evidence of an actual bona fide misconeeption of the law such as would negative knowledge of the existence of the obligation would if believed by the jury would justify a verdict for the defendant.

The jury it is submitted apparently fell into error in failing to distinguish between the elements of the offense involved and the proof required, in accordance with the applicable law as given to it by the Trial Court.

From a reading of the record, it is apparent that the defendant who is an elderly man of a very limited education had absolutely nothing to do with the managerial or administrative functions of the operations of the lottery companies. About all that can be said about the defendant Dominguez is that he hired the wrong accountant to prepare his income tax returns.

We submit that from all the evidence which was introduced in reference to intent showed that the defendant did not have the intent required under Title 26, U. S. Code §145 (a).

CONCLUSION

In conclusion it is respectfully submitted that because of the failure to establish any criminal intent on the part of the defendant that this petition for Writ of Certiorari should be granted.

Respectfully submitted,

EUGENE STANLEY
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that I have this ____ day of _____, 1957, served copies of the foregoing brief on counsel for the United States.

_____

EUGENE STANLEY
COUNSEL FOR PETITIONER

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 225) affirming the judgment of the District Court is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 24, 1957 (R. 227), and a petition for rehearing was denied on June 25, 1957 (R. 230). The petition for a writ of certiorari was filed on July 22, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

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QUESTION PRESENTED

Whether the evidence is sufficient to support the verdict.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> (a) *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.
>
> * * * * *

(26 U. S. C. 1952 ed., Sec. 145 (a).)

STATEMENT

On March 25, 1955, there was filed in the Eastern District of Louisiana a two-count information charging petitioner with having wilfully failed to file his individual income tax returns for the years 1952 and 1953, in violation of Section 145 (a) of the Internal Revenue Code of 1939. The information alleged that

petitioner had received a gross income of $498,779 in 1952 and $505,909 in 1953. (R. 2, 11.) The case was tried before a jury on October 29 and 30, 1956 (R. 6, 7) and petitioner was found guilty on both counts. (R. 214.) On November 9, 1956, petitioner was fined $10,000 on each count and sentenced to one year of imprisonment on each count, the sentences to run consecutively. (R. 218.)

The evidence to support the verdict may be summarized briefly as follows:

During the prosecution years, petitioner owned and operated two lottery companies. (R. 35, 67.) Each maintained a complete and satisfactory set of books (R. 41–45, 49, 70, 93) which, taken together, reflected the gross income alleged in the information, $498,779 in 1952 and $505,909 in 1953 (R. 47). Prior to the investigation, a 1952 income tax return had been prepared by petitioner's accountant, E. J. Robert, showing a taxable income of $36,321.82 (R. 51, 95–96, 115) and a tax liability of $15,580.75 (R. 120). These amounts were within a few hundred dollars of those computed by the Treasury agents. (R. 52, 95–96.) The 1952 return, however, was never filed, nor did petitioner file returns for 1951 or 1953. (R. 64, 101.) Robert called to petitioner's attention the fact that the returns were due on certain dates and that he would either have to file them or get an extension. (R. 108.) A 30-day extension was secured for filing the 1952 return, and possibly a 60-day extension for 1953, but they were permitted to expire. (R. 111, 122.)

During the years in question, petitioner was far behind in his payments of federal wagering and withholding taxes. (R. 155.) He was making weekly and bi-weekly payments on these obligations, and the Collector's office, although it was unable to "find any assets * * * tried every effort to get him to pay it." (R. 131–132.) Whenever petitioner made a payment on his delinquent wagering taxes he was furnished with a receipt showing the amount applied to principal and that applied to interest. (R. 78.)

During the investigation, petitioner explained to the Treasury agents that the reason he had not filed his 1952 income tax return was that his accountant did not have full information as to allowable deductions on account of interest paid to the Government. (R. 60–61.) Robert, testifying at the trial, confirmed this to some extent, but stated that he had been refused this information because he did not have "a power of attorney, or something of that kind." (R. 121.) When asked whether he had done anything further on the matter, Robert replied that he had waited for petitioner "to move, because I advised him that he had better make the inquiry, as he was the taxpayer." (R. 122.) The breakdown between interest and principal is, of course, readily available to any taxpayer who requests it. (R. 138.)

With respect to the 1953 return, Robert stated that he lacked the same information (*i. e.*, interest paid to the Government) plus data as to other deductions, such as charitable contributions and taxes paid. (R. 125–126.) Petitioner's allowable deductions on ac-

count of interest paid to the Government totalled $221.78 for 1952 and $533.47 for 1953. (R. 155.)

Petitioner did not testify at the trial, and the defense adduced no evidence.

ARGUMENT

Petitioner's sole contention is that the evidence did not establish that his failure to file his 1952 and 1953 income tax returns was willful. It is conceded (Pet. 8) that there is "no doubt but that he knew of his obligation to keep the required records and to file the said income tax returns", and he admitted to the investigating agents that he knew he had not filed (R. 60). The circumstances surrounding petitioner's failure to file are set forth above and need not be repeated in detail. He had filed returns for 1949 and 1950 (R. 102) but then ceased to file. He filed no returns for 1951, 1952, 1953 or 1954. (R. 64, 101, 116.) This consistent pattern of failure to file for four successive years is itself some evidence of willfulness. The excuse that these failures resulted from the lack of data as to the amounts of interest paid the Government is belied by (a) the testimony of petitioner's accountant, Robert, that he had asked petitioner to secure it; (b) the fact that the information was readily available on request, and petitioner already had some of the information in his files; (c) the fact that the actual amounts of the allowable deductions were small, being well under one per cent of the taxable income in 1952; and (d) the fact that Robert reminded petitioner that the returns were due on certain dates and that he would either have to

file them or get extensions. (*Supra*, pp. 3–5.) On the issue of petitioner's motive in not filing, the jury were plainly entitled to consider his straitened financial circumstances and the fact that he was delinquent with respect to the payment of federal taxes other than income taxes. (*Supra*, p. 4.)

The gist of the petition is that the fault lay entirely with Robert, the accountant, who was at best incompetent and at worst grossly negligent. This argument is at war with the fact that Robert was still doing petitioner's accounting work at the time of the trial, in October, 1956. (R. 6, 7, 112.) Petitioner was entitled to make this contention to the jury but it cannot help him here, in the face of the substantial evidence of guilt adduced by the Government. Cf. *Glasser* v. *United States*, 315 U. S. 60, 80.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957